VIRGINIA LAW REGISTER

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Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

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Homestead Exemption.

The case of Neblett *v.* Shackelton, Sheriff, etc., decided by our Supreme Court of Appeals January 12th, 1911, is one of much novelty and interest. It is a serious question, however, as to whether the law as now fixed by the Supreme Court was the law which the framers of the homestead exemption intended to frame. The exemption of a man's property from liability for his debts is at best dangerous and much to be deprecated, tending to the weakening of credit and the encouragement of dishonesty, but our homestead and other exemption laws are now too firmly fixed in our jurisprudence to make the discussion of their merits or demerits anything more than an academical question. But any decision which seems to stretch them beyond the amount contemplated by the law-making body seems to us very unfortunate.

The facts in the case under discussion are these: Neblett had filed a homestead deed claiming a tract of land in Lunenburg County valued at fifteen hundred dollars. Upon this farm he raised a crop of tobacco in which his interest amounted to something over six hundred and seventy-five dollars. Judgments were obtained against him and executions levied upon this crop after it had been severed by creditors who had no homestead waiver. The Sheriff was enjoined on the ground of irreparable injury and no adequate remedy at law, and the contention of Neblett was that no crops raised upon the homestead property could be subjected to debts which had no homestead exemption waiver. The lower court refused to allow this claim and dissolved the injunction and dismissed the bill. This our Supreme Court now holds to be error, and in reversing the lower court, quotes with approval the language of the Supreme Court of Ohio in Morgan *v.* Rountree, 88 Iowa 249: "Proceeds derived from the use of the homestead, while it remains such, are ex-

empt to the head of a family," and in conclusion says: "To deny to the homestead claimant exemption of the crops raised upon the homestead property would be injurious to the public as tending to discourage good husbandry and the general improvement of the land set apart as a homestead, and would render the benefit intended to be secured to the head of the family for the support of those depending upon him in many instances utterly vain and illusory." The natural result of this decision is that the usufruct of a homestead exemption, no matter what its amount, remains exempt from the claim of any creditor who has no homestead waiver. Had the tobacco crop been ten times its value, the result would be the same. Had it been an apple crop the result would be the same, and yet we know of more than one fruit farm in Virginia whose original value was far less than two thousand dollars, upon which the apple crop alone has fetched from three to five thousand dollars every other year. In more than one county in this State there are tracts of land whose value now is less than two thousand dollars, but were a railroad to go within a few miles of them the coal underlying them, now valueless, would bring to its owner many thousand dollars per annum; yet, under this decision, this coal, if lying under a tract which had been claimed as homestead, could not be touched by execution for non-waiver debts when mined and ready for market. The "collossal fortunes in defiance of debts past or future * * * built up upon a nucleus of income derived from a capitalization and re-capitalization of the proceeds of crops derived from land set apart as homestead," is not so much a figment of the brain as the court supposes and may very well be feared; but it is not the main difficulty. The constitution expressly limited the amount of the homestead exemption to two thousand dollars. "Real and personal property, or either, including money and debts due to him (the householder, etc.) to the value of *not exceeding two thousand dollars,*" is the language of the Constitution.

Section 3644 of the Code allows a re-valuation of the homestead after being set apart, and if a creditor can show that, by reason of permanent improvements made upon the real estate, the whole estate set apart is of greater value than two thousand

dollars, the excess of the two thousand dollars can be subjected to the debts. So it looks as if the Legislature did not intend that the homestead should exceed the two thousand dollars. But the Court's argument might be as well applied to this section. What would be the use of a man's claiming the homestead estate in land if he was not allowed to improve it? This would certainly discourage the improvement of real estate as much as holding the crops subject to the debts would discourage good husbandry.

The result of this decision is to extend this amount to practically an unlimited extent. If the usufruct of land set apart as homestead is not liable to debts, why should interest or the proceeds of speculation upon two thousand dollars of money set apart as homestead be liable? Money unused is as valueless as cotton unpicked or tobacco uncut. If, therefore, a householder sets apart two thousand dollars in cash and goes into the stock market and makes a million (more than one instance has occurred), then if he can show that this million is the proceeds of that two thousand dollars, would it not be exempted under the ruling of the court; for would it not be equally "vain and illusory" to allow a man two thousand dollars in money and then not permit him to use it to make more, without that which was made from the money being liable for his debts? The same argument which the court uses, that "To deny this right to claim the crops would be injurious to the public as tending to discourage good husbandry and the general improvement of land," would apply to money and the discouragement of trading, if the usufruct of the money is to be taken by the creditor. And yet if one argument is true, the other is equally true and the far-reaching effect of this decision is at once seen. We believe that it was the intention of the law to allow a householder, etc., two thousand dollars, and that having received that, he should receive no more. Had the law-making body intended the usufruct of this amount to be exempt, they would certainly have said so, it seems to us. The court in our humble judgment has not only "construed the law liberally," but read into it an amendment which extends the amount of the homestead to an almost unlimited extent.

Liability of the Husband to the Wife for an Assault upon Her.

The Supreme Court of the United States on December 12th, 1910, decided in the case of Thompson *v.* Thompson, that under the Statute of the District of Columbia, giving married women the power to sue separately for torts committed against them "as fully and freely as if they were unmarried," a woman could not maintain an action against her husband for assault and battery committed by him upon her. The District of Columbia statute is like the statute in most states known generally as the "Married Woman's Law," and is about as full and complete as a statute could well be.

The Court—by Mr. Justice Day—holds that the statute gave the wife no right of action whatever against the husband, but merely altered the common law to the extent of allowing her to sue alone in cases where at common law action had to be brought in the joint names of herself and her husband. The Court leaves her for such wrongs to the divorce court, with a claim for alimony, or to the police court for the punishment of the offender, and whilst naively saying that the court can only interpret the law and cannot let questions of injury to public welfare and domestic harmony affect its decisions, yet construes the very strong language used in the statute as if the words "except when committed by her husband," had been inserted after the word "tort."

Mr. Justice Harlan, in a strong dissenting opinion—concurred in by JJ. Holmes and Hughes—takes the ground that the statutory provisions properly construed embrace suits by the wife against the husband for his torts upon her. He takes the ground that when the law-making power used the language "as if they were unmarried," that it meant what it said and that the court had nothing to do with what the husband and wife were at common law. He concludes an almost unanswerable argument with the following strong and wise language:

"With the policy, wisdom or justice of the legislation in question, this Court can have no rightful concern. It must take the law as it has been established by competent legislative authority. It cannot in any legal sense make law, but only declare what the law is, as established by competent authority.

"My brethren feel constrained to say that the present case illustrates the attempt often made to effect radical changes in the common law by mere construction. On the contrary the judgment just rendered will have, as I think, the effect to defeat the clearly expressed will of the Legislature by a construction of words that cannot be reconciled with their ordinary meaning."

This decision leaves the law in a curious condition. The wife has a right—and indeed has always had the right—to sue her husband in respect to her separate property. 1 Fonbl. Equity, B. 1, Ch. 2, § 6, note (p). But her person—certainly more sacred and worthy of the care of the law—remains as it was at common law, absolutely the husband's and she cannot sue him for injuries thereto, even under a clause as broad as the one in the statute construed. We wonder if the Court approves the doctrine laid down in Bradley *v.* State, Walk (Miss.) 156, that a husband had the right of moderate chastisement. We are constrained to believe that the law-making power never contemplated the construction of the act now placed upon it by the Supreme Court of the United States.

Penal Bond Action by Beneficiary.

In the case of Penn Iron Company *v.* William R. Trigg Company, 106 Va. 507, the Supreme Court of Appeals of Virginia held that: "A penal bond given to the United States, with condition to faithfully perform a contract to construct a seagoing suction dredge, and to promptly make full payment to all persons supplying labor and materials for the prosecution of the work thereon is the property of the United States, and no action can be brought thereon by any beneficiary under it in the name of the United States. No such action could be brought except as authorized by some act of Congress, and there is none. The act of Congress of August 13, 1894, relating to the construction of public buildings and the prosecution and completion of public works does not apply to this case, as the construction of a seagoing suction dredge is not a 'public work' within the meaning of the act."

It may be well for the members of the Virginia bar to anno-

tate this decision with that of Title Guaranty & Trust Company *v.* Crane Company, 31 Sup. Ct. R. 140, decided December 19, 1910, in which the Supreme Court of the United States adopted the opposite view, holding that a vessel building for the United States, the title to which passes to the government as fast as paid for, is a "public work" within the meaning of the Act of Congress, approved August 13, 1894, as amended by the Act, approved February 24, 1905, requiring a bond from the contractor for the protection of persons furnishing labor or materials for the construction of public works, and that an action can be brought accordingly in the name of the United States for the use of the beneficiary.

The opinion does not cite the decision in the Penn Iron Company case, *supra,* of which the controlling consideration was that the term "public works" includes all *fixed* works constructed for public use, as railways, docks, canals, water works, roads, etc., and excludes a seagoing vessel. The Virginia court, however, based its judgment in large measure upon an opinion to the same effect rendered by the Attorney General of the United States to the Secretary of the Navy. Upon the merits of the question, Mr. Justice Holmes says:

> "The argument that the vessel was not a public work loses most of its force when it appears that the title was in the United States as soon as the first payment was made. Of course, public works usually are of a permanent nature, and that fact leads to a certain degree of association between the notion of permanence and the phrase. But the association is only empirical, not one of logic. Whether a work is public or not does not depend upon its being attached to the soil; if it belongs to the representative of the public, it is public, and we do not think that the arbitrary association that we have mentioned amounts to a coalescence of the more limited idea with speech so absolute that we are bound to read 'any public works' as confined to work on land. It is not necessary to discuss in detail some opinions from the Attorney General's office in cases where the title did not pass that looked rather in the opposite direction. It is enough to say that there has been no such clear and established construction as to cause us to yield our own view. On the other hand, the decision of some other courts has been in accord with the judgment below and with what we

now decide. United States use of Tidewater Steel Co. *v.* Perth Amboy Shipbuilding & Engineering Co., 137 Fed. 689, 693; American Surety Co. *v.* Lawrenceville Cement Co., 110 Fed. 717, 719; United States use of Standard Furniture Co. *v.* Aetna Indemnity Co., 40 Wash. 87, 82 Pac. 171."

It seems to us that the federal court has the better of the argument. It is difficult to believe that Congress, in enacting the remedial legislation in question, intended to exclude from its operation one of the principal classes of public works.

The Employers Liability Act of 1908.

The peculiar condition of law based upon the decisions of the different states is nowhere brought into light more clearly than in the conflict between the courts of Connecticut and those of New Jersey in the matter of the Federal Employers' Liability Act of 1908. It will be recalled that Judge Baldwin, the present Governor of Connecticut, held that this act was unconstitutional and thereby brought down upon himself the thunders of the wrath of one Colonel Theodore Roosevelt. The act has lately come before Judge Rellstab of the United States Circuit Court of the District of New York, who holds it to be constitutional.

The facts are as follows: Charles Anderson of Jersey City, an engineer on a Lehigh Valley Railroad train, was killed while hauling a load into Jersey City. The engine was derailed and he was thrown out and so injured that he died. Kate Anderson, his widow, brought suit for $75,000 damages, in the United States Circuit Court at Trenton. The defendant company, demurred on the ground that the Employers' Liability Act of 1908, which had been urged, was unconstitutional. The plaintiff urged the common law, and the New Jersey State Employers' Liability act.

In overruling the demurrer, Judge Rellstab said, in part:

> The second count is based upon the act of Congress approved April 22, 1908, generally known as the Federal Employers' Liability Act. The facts alleged constitute a cause of action given by such act.

This act is attacked on constitutional grounds. It is said to be unconstitutional:

First, because it regulates the relation between a railroad engaged in interstate commerce and its intrastate employees, by making the railroad liable for negligence of the intrastate employee where there has resulted from such negligence an injury to an interstate employee.

Second, as in violation of the Fifth Amendment to the United States Constitution:

(a) In its classification of persons subject to the act.

(b) Because § 5 of the act prohibits any contract to enable a common carrier to exempt itself from liability.

(c) Because it sanctions a recovery when the plaintiff has been guilty of gross negligence and the defendant none at all.

Third, that it infringes the power of the State in its legislation for recovery and distribution of damages.

The act of 1908 was passed after the Federal Employers' Liability act of 1906 had been declared unconstitutional.

The grounds here asserted against the constitutionality of the act of 1908 are the same that were pressed against the act of 1906. Congress, by its last enactment, sought to remove the constitutional defects found to exist in the earlier act.

In view of the uniform holding of the Federal courts that this act is constitutional, the duty of the court in this instance is plain. It is to sustain the constitutionality of the act, and permit the plaintiff to proceed with her action. The demurrer is therefore overruled.

An appeal has been taken to the Supreme Court of the United States and we can expect to have the Constitutionality of the Act finally settled by that tribunal.

Technicalities and Human Life.

There has been some criticism of our Supreme Court of Appeals because in Wright's case, decided January 12th, 1911, the writ of error was dismissed because of the failure of the prisoner to have the bills of exception relied upon by him signed and made parts of the record in the time and manner prescribed by law; whereas Jones and Perkins, convicted of a similar crime to which Wright was con-

victed and with him sentenced to be hanged, were granted new trials upon assignments of error.

This criticism is entirely without merit. The terms of the law are plain and direct and it had been passed upon by the Court in Wingfield *v.* McGhee, 108 Va. 120. Its provisions were ignored in Wright's case. The Court could do nothing else than it did do in that case without itself making law or violating the plain terms of the law of the land. We have no doubt that the Executive will interfere, as suggested by the court and respite Wright until his codefendants are retried, and then be governed by the verdicts in their cases. Courts are created to construe the law and to see that the provisions of the law are strictly carried out and our Court did no more than its plain duty in Wright's case. Our Supreme Court has once before declined to interfere and suggested Executive clemency, where the conviction was clearly legal but where the guilt of the accused did not involve as great a degree of turpitude as it would have done under other circumstances. In Lawrence's Case, 30 Gratt. 845, a man was convicted of rape, the female being under twelve years of age. It appeared that she consented to the act; that she was believed by the accused to be a woman of mature years; that she was generally believed to be and actually appeared to be of mature years and that there was some question as to her exact age. The Court affirmed the conviction, but unanimously recommended the man to executive clemency and he was pardoned.

Is It Obiter Dicta?

In the case of Commonwealth *v.* Willcox, Hannan & Kellinger, decided by our Supreme Court of Appeals January 11th, the Court made a departure from its usual custom which has excited some comment amongst the members of the Bar. For our own part we heartily approve of the Court expressing its opinion upon every phase of a case presented before it and not sending the case back for a retrial, leaving untouched questions fairly presented, whether necessary to the immediate decision of the case at bar or not, and in expressing the opinion in this case as it has done the Court had the force of a great

example before it—that of Chief Justice Tawney in the Dred Scott case.

But an important question is asked us by an esteemed correspondent, and we submit our views. Is the opinion of the Court in the case under discussion binding authority upon the court below or is it merely *obiter dicta?*

Willcox, Hannan & Kellinger were indicted in the Corporation Court of the City of Norfolk for corrupt practices whilst acting as judges in a primary election held for the nomination of a member of Congress. They appeared in person and by counsel and demurred to the indictment. The demurrer was sustained and the prisoners discharged. The Attorney General presented a petition for a writ of error to the judgment dismissing the indictment, claiming that the court had jurisdiction under § 4052 of the Virginia Code of 1904, which allowed an appeal by the Commonwealth in cases of violation of law relating to the State revenue or for the violation of a law declared to be unconstitutional. But the Supreme Court held that section unconstitutional under § 88 of the Constitution and declined to take jurisdiction. Under ordinary circumstances and according to its almost universal rule, this would have ended the matter, as not having jurisdiction there was nothing before the Court to decide. But the Court in a lengthy and able opinion took up the question which was before the Corporation Court and as far as the opinion could go practically reversed that Court's decision. So that the Commonwealth in a case in which the Court had no jurisdiction obtained the benefit of the opinion of the Court upon the very question upon which it appealed. The Court as a reason sets out the fact that in the case of Commonwealth *v.* Jackson Wise, the Hustings Court of the City of Richmond reached a different conclusion in a similar case before it, and Wise being indicted was tried for a similar offence and convicted. He applied for a writ of error and the Supreme Court refused it without assigning any reasons. The Court now gives its conclusions and reasons, stating that it felt it was its duty to do so because the law would have been left upon a subject of such grave importance in a very unsatisfactory state, and the Court been placed in a contradictory position. We cannot agree with

the Court in its last conclusion. The refusal of a writ of error for the person convicted and appealing, and the refusal to take jurisdiction for the Commonwealth appealing a criminal case, could not in any way seem contradictory when the facts appear. But the more important question is: Does the opinion of the Court in the present case fix the law, and is it binding upon the lower courts? Or is it mere *dictum,* appealing to the sound judgment of the inferior court, but doing no more? No inferior judge, we take it, would for one moment disregard the opinion and judgment of the Supreme Court in a case which was properly before that Court, and the Court rendering an opinion upon the merits of the case before it. But a mere dictum has never been held to be authority. The Supreme Court itself has in more than one instance declared that it did not consider itself bound by any decision unless the decision was upon a question actually in issue. Trustees, etc. *v.* Guthrie, 86 Va. 125; Griffin *v.* Woolford, 100 Va. 473. The only question in issue was the jurisdiction of the Court. So the opinion in the present case *does not fix the law.* It is the opinion of five eminent judges learned in the law—an opinion entitled to the highest respect—but certainly not *ex cathedra,* and which binds any lower court further than by the power of its argument, the cogency of its reasoning and the dignity and legal attainments of the great lawyer who pronounced it and the great lawyers who concurred in it.

It is not the *opinion of the Court*—for a court cannot pronounce an opinion, as a court, upon the merits of a case in which it has no jurisdiction.

It may be argued that the Court now renders this opinion as its opinion in Wise's case. That case is ended and was not before the Court in January, 1911, any more than the merits of the present case was before the Court. Not having jurisdiction, there was nothing before the Court to decide.

At the same time, waiving all other questions, it will be exceedingly fortunate and go far to purify elections and check the riot of fraud which otherwise might take place, if the judges of our inferior courts will carefully consider the argument so ably presented and agree with the conclusions reached—conclusions which we have always believed to be the correct interpretation of the law.